

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

VT HACKNEY, INC.

and

Cases 06-CA-199799
06-CA-200380
06-RC-198567

UNITED STEEL, PAPER AND FORESTRY, RUBBER,
MANUFACTURING, ENERGY, ALLIED INDUSTRIAL
AND SERVICE WORKERS INTERNATIONAL UNION,
AFL-CIO, CLC

David L. Shepley, Esq.,
for the General Counsel.

Brad Manzollilo, Esq.,
for the Charging Party.

James H. Fowles, III and Sara McCreary, Esqs.
(Ogletree, Deakins, Nash, Smoak & Stewart, PC),
for the Respondent.

DECISION

STATEMENT OF THE CASE

ROBERT A. RINGLER, Administrative Law Judge. This case was tried in Williamsport, Pennsylvania on February 21, 2018. The complaint alleged that VT Hackney, Inc. (Hackney or the Respondent) violated §8(a)(1) of the National Labor Relations Act (the Act) by, inter alia, removing union literature and materials from its employees' tool cabinets, interrogating workers about their union sympathies, and soliciting employees to present their grievances in order to discourage them from unionizing. The complaint allegations were consolidated with several election objections,¹ which the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO (the Union) asserts warrant setting aside an election that it consequently lost.

¹ The Union initially filed 8 objections. (GC Exh. 1(m)). On October 13, it withdrew objections 1, 2, 3 and 5. (Id.). At the hearing, it then retracted 6 and 8 (tr. 6), which only left objections 4 and 7. Objection 4 mirrors complaint ¶7 (i.e., removal of pro-Union material), and objection 7 mirrors complaint ¶9 (i.e., solicitation of grievances).

On the entire record, including my observation of the witnesses' demeanors, and after considering the parties' post-hearing briefs, I make the following

FINDINGS OF FACT²

I. JURISDICTION

At all material times, Hackney, a corporation with an office and place of business in Montgomery, Pennsylvania (the plant), has manufactured and sold refrigerated truck bodies and trailers. Annually, it sells and ships from its plant goods valued at more than \$50,000 directly outside of Pennsylvania. It, thus, admits, and I find, that it is an employer engaged in commerce, within the meaning of §2(2), (6) and (7) of the Act. It further admits, and I find, that the Union is a labor organization, within the meaning of §2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Introduction

In early 2017,³ the Union began organizing the plant. On May 18, the parties entered into a *Stipulated Election Agreement*, which set a vote in this bargaining unit (the unit):⁴

All ... production, maintenance, shipping and receiving, and quality control employees, ... employed at the plant, excluding all office clerical employees and guards, professional employees and supervisors as defined by the Act.

(GC Exh. 1). A vote was held on June 1, which the Union lost by a 113 to 83 margin. (Id.). The complaint alleged that Hackney committed 3 unfair labor practices (the ULPs) before the election; the Union averred in its objections that 2 of the ULPs caused its election defeat.

B. May – Confiscation of Union Election Materials

1. General Counsel's (the GC) Stance

Electrician Brian Schutt testified that, on May 11, he placed pro-Union flyers and a pin in his tool cabinet.⁵ He said that 4 coworkers (i.e., Jason Koch, Joe Hemus, Willie Wingo and Mike Mitchtree) also placed pro-Union flyers in their tool cabinets. He recollected David Bohannon, his then supervisor,⁶ removing and discarding these flyers. He said that Bohannon handed the pin back to him, and said that pins could only be worn.⁷ He insisted that Hackney

² Unless otherwise stated, factual findings arise from joint exhibits, stipulations and undisputed evidence.

³ All dates are in 2017, unless otherwise stated.

⁴ There were approximately 215 employees in the unit.

⁵ Electricians utilized multi-drawer tool cabinets, which are several feet in height.

⁶ Bohannon left Hackney on May 22, and was replaced by supervisor Ryan Baker.

⁷ The pin only stated the Union's name.

never previously limited what was stored in tool cabinets.⁸ He said that, shortly thereafter, Bohannon contradictorily passed out anti-Union flyers to himself, Koch, Hemus, Wingo and Mitchtree, and directed them to educate themselves. (Tr. 37-38). He recollected the others placing these anti-Union flyers in their tool cabinets in Bohannon's presence, without objection. (Tr. 38). He noted that, when employees received anti-Union flyers at company meetings, their flyers were often placed in their tool cabinets, without objection from Bohannon or Baker.

Employee Corey Trojan testified that, in mid-May, he observed Bohannon removing and discarding pro-union flyers and pins from tool cabinets. He said that Bohannon told him that flyers "are not to be displayed," and pins could only be worn. (Tr. 69). He corroborated that he was unaware of any rule at that time, which supported Bohannon's actions. Employee Jason Sees corroborated Schutt's and Trojan's accounts. He said that, when he asked Bohannon why it was okay for him to pass out anti-Union flyers after contrarily discarding pro-Union flyers, Bohannon retorted that it was okay because the company was paying their salaries. (Tr. 95).

2. Hackney's Position

Supervisor Baker testified that, in the interest of workplace safety, the plant must be kept free of debris. He said that standard housekeeping principles apply, and that employees possessing flyers at work is solicitation, which is covered by this policy:

Solicitation by employees on company property is prohibited when the person soliciting or the person being solicited is on working time....

Distribution of non-work related literature by employees on company property in nonworking areas during working time is prohibited.

Distribution of non-work related literature by employees on company property in working areas is prohibited.

(R. Exh. 3). He said that he would permit photos taped to tool cabinets, wallets, phones or similar items that could not be blown away and become litter. He added that the plant gets breezy, when doors are left open for ventilation in the spring and summer. It is noteworthy that Hackney did not rebut Bohannon's confiscation of pro-Union flyers, his distribution of anti-Union flyers during working time, or the open storage of anti-Union flyers in tool cabinets.

3. Credibility analysis

Schutt's, Trojan's and Sees' accounts that Bohannon confiscated pro-Union materials and then distributed his own anti-Union materials during work hours, and that both Bohannon

⁸ He added that workers routinely stored food, sodas, wallets, cell phones and car keys in their tool cabinets.

and Baker knowingly permitted anti-Union flyers to be stored in tool cabinets was not rebutted, and has been credited.⁹

C. May 20 – Exchanges with HR Manager Judy Ross

Former employee David Wise testified that, on May 20, HR Manager Judy Ross stopped him on the plant floor, told him that Bohannon said that he was a good worker, and asked him what he thought about the Union. (Tr. 15). He replied that he was still gathering information. He recalled her then stating that, in reference to the election, “we are counting on you.”¹⁰

Ross generally recalled talking to Wise about the election, and contended that she only asked him how he was faring with the “craziness of the campaign.” (Tr. 157). She recalled generally telling employees that the company was counting on them to vote, their opinion matters, voting is a privilege and other words to that effect. She denied asking Wise how he felt about the Union, and insisted that she knew better. She did agree, during cross examination, that her question about the campaign craziness was vague, and could have coaxed the revelation of Union activities. (Tr. 166–67). She agreed that she had many conversations before the election, and that it was hard to recall each discussion. (Tr. 169).

Given that Wise said that Ross asked him whether he supported the Union and told him that Hackney was counting on him during the election, and Ross denied such commentary, a credibility resolution must be made. For several reasons, Wise has been credited. He was a straightforward and consistent witness, with a strong recollection. He had a good overall demeanor and was consistently cooperative. Ross, however, had a poor recollection of their exchange. I also find it plausible that, after approaching dozens of workers about the election, Ross simply chose the specific words that she stated to Wise inartfully, and made the alleged comments. In sum, I find that, on May 20, Ross asked Wise what he thought about the Union, and said that, “we are counting on you,” in reference to the election.

D. May 22 – Meeting with Labor Consultant Charles Stephenson

On May 22, Schutt, Trojan and about 15 coworkers attended a 1-hour meeting in the plant’s training room. Production Manager Jim Moser and Stephenson presented Hackney’s stance on the Union and election.

1. GC’s Stance

Trojan recalled the May 22 meeting, and testified that Stephenson told employees that they did not need a Union, “asked the employees what our concerns were,” said that he would then take those concerns back to management,” and pledged that “management would fix any

⁹ Schutt, Trojan and Sees were also credible and consistent witnesses, with solid demeanors.

¹⁰ He denied ever communicating his position on unionization to Ross.

issue addressing our concerns.” (Tr. 63). Schutt generally corroborated his account.

2. Hackney’s Position

5 Stephenson testified that he made individual and small group presentations to workers before the election. He related that he used power point slides and recited selected provisions from the *Basic Guide to the National Labor Relations Act* (the NLRA Guide), which he found on the NLRB’s website. See also (R. Exhs. 1–4). He denied asking employees to state their concerns, or promising to bring their problems to management for resolution. He initially
10 insisted that he read his slides verbatim, but, then reluctantly agreed that he might have elaborated. (Tr. 149). He remarkably denied, however, that the goal of his meetings was to help the company win the election, and astonishingly claimed that his only goal was to neutrally and impartially educate workers.¹¹ Moser stated that he was present during Stephenson’s meetings; he also averred that the meetings were designed to educate employees
15 and not sway them.

3. Credibility analysis

20 I credit Schutt and Trojan. Stephenson was a slick and, unfortunately, deceitful witness. His contention that his sole goal was to kindly educate workers as a neutral was preposterous, given that Hackney paid him to present its lawful stance against unionization. His claim that he was an impartial educator was also contradicted by his slides, which clearly advocated against unionization. I find, as a result, that his neutral educator defense was unavailing, and eviscerated his credibility. I found Moser’s comparable claims to be equally
25 unappealing. I found Schutt and Trojan, however, to be persuasive and believable witnesses with strong demeanors. As current employees, they courageously and diplomatically presented difficult facts to the detriment of their employer in the presence of high level company officials at the hearing; such candor enhanced their credibility. I find, as a result, that, on May 22, Stephenson told employees that they did not need a Union, asked them what
30 their concerns were, and said that he would bring their concerns back to management for resolution.

III. ANALYSIS

35 A. ULP Allegations

1. Removal of Union Literature¹²

40 Hackney violated §8(a)(1), when Bohannon confiscated pro-Union materials stored in employees’ tool cabinets, distributed anti-Union materials to the same workers, and then permitted them to store anti-Union materials in their tool cabinets. The Board has long held that the application of a presumptively valid rule in a disparate manner violates §8(a)(1).

¹¹ Although Hackney paid him, he amazingly said that, “I really don’t have a dog in the fight.” (Tr. 149–50).

¹² This allegation is listed under complaint pars. 7 and 10.

Circuit-Wise, Inc., 306 NLRB 766, 787-788 (1992); *South Nassau Hospital*, 274 NLRB 1181 (1985); *St. Vincent's Hospital*, 265 NLRB 38 (1982), enfd. in pertinent part 729 F.2d 730 (11th Cir. 1984). Bohannon's actions were, as a result, unlawful.

2. Interrogation¹³

Hackney violated §8(a)(1), when, on May 20, Ross asked Wise, a neophyte whose Union sympathies were unknown, what he thought about the Union, and told him that, "we are counting on you" in the election. In *Westwood Healthcare Center*, 330 NLRB 935 (2000), the Board held that the following factors determine whether an interrogation is unlawful:

- (1) The background, i.e. is there a history of employer hostility and discrimination?
- (2) The nature of the information sought, e.g., did the interrogator appear to be seeking information on which to base taking action against individual employees?
- (3) The identity of the questioner, i.e. how high was he in the company hierarchy?
- (4) Place and method of interrogation, e.g. was employee called from work to the boss's office? Was there an atmosphere of unnatural formality?
- (5) Truthfulness of the reply.

Id. at 939. In applying these factors, however, the Board concluded that:

In the final analysis, our task is to determine whether under all the circumstances the questioning at issue would reasonably tend to coerce the employee at whom it is directed so that he or she would feel restrained from exercising rights protected by Section 7 of the Act.

Id. at page 940.

Wise's commentary was an unlawful interrogation. These factors are controlling: Ross, the questioner, was a high-ranking plant official; Wise, the recipient, was a neophyte who was reasonably insecure about his employment status; Hackney concurrently committed other ULPs before the election; and the interrogation occurred less than 2 weeks before the election. Under these circumstances, Ross' query to Wise about how he felt about the Union and pointed reminder that Hackney was counting on him during the election was highly coercive. Wise could have reasonably concluded that Ross was subtly threatening him to support Hackney, and that his ongoing tenure might be conditioned upon this ultimatum.

¹³ This allegation is listed under complaint pars. 8 and 10.

3. Solicitation of Grievances¹⁴

Hackney violated §8(a)(1), when, on May 22, Stephenson told employees during a meeting that they did not need a Union, asked them what their concerns were, and said that he would bring their concerns back to management for resolution. An employer's solicitation of grievances during a campaign is unlawful when it "carries with it an implicit or explicit promise to remedy the grievances and 'impress[es] upon employees that union representation [is] . . . [un]necessary.'" *Albertson's, LLC*, 359 NLRB 1341, 1341 (2013) (quoting *Ampitech, Inc.*, 342 NLRB 1131, 1137 (2004), *enfd. mem.* 165 Fed. Appx. 435 (6th Cir. 2006)), *affd.* and incorporated by reference 361 NLRB 761 (2014). The Board has held that:

Absent a previous practice of doing so ... the solicitation of grievances during an organizational campaign accompanied by a promise, expressed or implied, to remedy such grievances violates the Act ... [I]t is the promise, expressed or implied, to remedy the grievances that constitutes the essence of the violation [T]he fact [that] an employer's representative does not make a commitment to specifically take corrective action does not abrogate the anticipation of improved conditions expectable for the employees involved.

Maple Grove Health Care Center, 330 NLRB 775, 775 (2000). "An employer may rebut the inference of an implied promise by ... establishing that it had a past practice of soliciting grievances in a like manner prior to the critical period, or by [showing] ... that the statements at issue were not promises." *Mandalay Bay Resort & Casino*, 355 NLRB 529, 529 (2010).

Stephenson's commentary was unlawful. A reasonable employee would have interpreted his solicitation of grievances as an implied promise to remedy the very same issues that prompted the organizing drive. Hackney made no evidentiary showing that it had an established past practice of previously soliciting grievances in a comparable way. Stephenson's solicitation, thus, violated §8(a)(1). See, e.g., *Reliance Electric Co.*, 191 NLRB 44, 46 (1971), *enfd.* 457 F.2d 503 (6th Cir. 1972); *Mandalay Bay Resort & Casino*, *supra* at 530. Cf. *Johnson Technology, Inc.*, 345 NLRB 762, 764 (2005) (employer did not unlawfully solicit grievances because it had an established a past practice predating the organizing drive).

B. Representation Case

The Union's objections are valid, and warrant a rerun election. It avers that objection 4 (i.e., removal of pro-Union material) and objection 7 (i.e., solicitation of grievances) prevented employees from exercising free choice during the election. These objections are sustained, inasmuch as they mirrored complaint pars. 7 and 9, which were found to be §8(a)(1) violations and occurred during the critical period before the election (i.e., May 11 to June 1).¹⁵ Regarding §8(a)(1) violations occurring during the critical period, the Board has held that:

¹⁴ This allegation is listed under complaint pars. 9 and 10.

¹⁵ *Ideal Electric Mfg. Co.*, 134 NLRB 1275 (1961) (critical period runs from petition to election dates).

A violation of Section 8(a)(1) during the critical election period is, a fortiori, conduct that interferes with the results of the election unless it is so de minimis that it is “virtually impossible to conclude that [the violation] could have affected the results of the election.” *Super Thrift Markets, Inc.*, 233 NLRB 409, 409 (1977). See also *Baton Rouge General Hospital*, 283 NLRB 192, 192 fn. 5 (1987); *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786 (1962). In determining whether the unlawful conduct is de minimis, the Board considers the number of incidents, their severity, the extent of dissemination, the size of the unit, and other relevant factors. See *Super Thrift Markets*, 233 NLRB at 409.

Intertape Polymer Corp., 363 NLRB No. 187, slip op. at 2 (2016)

Hackney’s unlawful conduct interfered with employees’ free choice in what was already a fairly close election. See, e.g., *Allied Mechanical, Inc.*, 343 NLRB 631, 632 (2004) (removing union literature during the critical period “denied employees access to an important medium of communication during the union campaign” and warranted setting aside the election); *Bon Marche*, 308 NLRB 184, 185 (1992) (change in bulletin board policy to prohibit non-work literature “clearly affected the entire bargaining unit that the Union sought to represent”); *Mandalay Bay Resort & Casino*, supra, 355 NLRB at 530 (unlawful solicitation of grievances during critical period warrants rerun). I recommend, accordingly, that the election be invalidated and employees be permitted to vote in a second untainted election. *Intertape Polymer Corp.*, supra; *IRIS U.S.A., Inc.*, 336 NLRB 1013 (2001).

Conclusions of Law

1. Hackney is an employer engaged in commerce within the meaning of §2(2), (6), and (7) of the Act.

2. The Union is a §2(5) labor organization.

3. Hackney violated §8(a)(1) of the Act by:

a. Confiscating Union materials from its employees’ tool cabinets.

b. Interrogating employees about their Union or other protected concerted activities.

c. Soliciting grievances from employees and making an implied promise to remedy such issues in order to discourage their Union support.

4. Such unfair labor practices affect commerce within the meaning of §2(6) and (7).

5. By engaging in the conduct cited by objections 4 and 7, Hackney prevented employees from participating in a fair election in Case 06-RC-198567.

6. The election in Case 06-RC-198567 should be set aside and rerun.

REMEDY

Hackney is ordered to cease and desist, and take certain affirmative action designed to effectuate the Act's policies. It must distribute appropriate remedial notices electronically via email, intranet, internet, or other appropriate electronic means to its unit employees at the plant, if it normally communicates with its workers electronically, in addition to the traditional physical posting of paper notices. *J. Picini Flooring*, 356 NLRB 11 (2010).

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended¹⁶

ORDER

The Respondent, VT Hackney, Inc., Montgomery, Pennsylvania, its officers, agents, and representatives, shall

1. Cease and desist from
 - a. Confiscating Union materials from its employees' tool cabinets.
 - b. Interrogating employees about their Union or other protected concerted activities.
 - c. Soliciting grievances from employees and making an implied promise to remedy such issues in order to discourage their Union support.
 - d. In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

- a. Within 14 days after service by the Region, post at it Montgomery, Pennsylvania plant, copies of the attached notice, marked "Appendix."¹⁷ Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for

¹⁶ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

¹⁷ If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of such paper notices, notices shall be distributed electronically such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, it shall duplicate and mail, at its own expense, a copy of the notice to all unit employees employed by it at its Montgomery, Pennsylvania plant at any time since May 11, 2017.

b. Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that it has taken to comply.

IT IS FURTHER ORDERED that the Regional Director for Region 6 shall, in Case 06-RC-198567, set aside that election, and hold a new election.

Dated Washington, D.C., April 19, 2018.



Robert A. Ringler
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT confiscate flyers and other materials from your tool cabinets, which support the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO (the Union).

WE WILL NOT ask you about your Union or other protected concerted activities.

WE WILL NOT solicit your grievances and make implied promises to remedy your issues in order to discourage you from supporting the Union.

WE WILL NOT in any like or related manner interfere with, restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

VT HACKNEY, INC.

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

1000 Liberty Avenue, Federal Building, Room 904, Pittsburgh, PA 15222-4111
(412) 395-4400; Hours: 8:30 a.m. to 5:00 p.m.

The Administrative Law Judge's decision can be found at <https://www.nlr.gov/case/06-CA-199799> or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (412) 690-7117.